N A R U C
National Association of Regulatory Utility Commissioners

February 7,2003

Office of the Secretary
Federal Communications Commission
445 12th Street SW, Suite TW-8B115
Washington, DC 20554

Re: NOTICE OF WRITTEN EX PARTE COMMENTS – Filed in the proceeding captioned: *Triennial Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338; CC Docket No. 96-98; and CC Docket No. 98-147

Dear Secretary:

This notice of ex parte contacts is meant to cover written comments sent electronically yesterday to each FCC Commissioner's offices prior to the FCC's Sunshine notice in this docket.

A. The ***North Dakota Public Service Commission*** filed a letter to the ***FCC Commissioners*** in regards to the UNE Triennial Review proceeding. (Attached)

B. ***The Indiana Utility Regulatory Commission*** filed a letter to the ***FCC Commissioners*** in regards to UNE Triennial Review proceeding. (Attached)

C. ***Gretchen Dumas, Senior Attorney for the California Public Utilities Commission,*** sent the following e-mail Thursday, February 06, 2003 at 1:54 PM To: Chris Libertelli; Matthew Brill; Jordan Goldstein; and Lisa Zaina – "Subjectt: ExParte - Triennial Review Order regarding customer disruption Dear FCC Commissioners and Assistants, I am writing this e-mail on behalf of the California Public Utilities Commission(California). California has filed comments before you in this proceeding and has made numerous ex parte contacts. As its last ex parte contact before the Sunshine Period begins, California wishes to express its concerns regarding disruption **of** service to CLEC customers that could result from the proposed Triennial Review Order. The FCC is scheduled to vote on the Triennial Review Order later this month. Therefore, we would advocate that some type of transition period be put in place in the Order to protect customers from service disruptions. Thank you for your consideration. Gretchen Dumas, Senior Attorney for the California Public Utilities Commission."

If you have any questions about this, **or** any other NARUC filing, please do not hesitate to give me a call at 202-898-2207 **or** jramsavk2naruc.org.

Sinc

Public Service Commission
State of North Dakota

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February 6,2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Powell:

The North Dakota Public Service Commission wishes to take this opportunity to submit brief comments in the UNE Triennial Review proceeding. As the Federal Communications Commission discusses the future of the unbundled network element platform, we would request. consideration of the following he given.

In whatever plan eventually emerges, we would ask that the FCC make a presumption towards impairment for at least some transition period of lime, especially for residential and small business customers. This would give state commissions such as ours a reasonable period of time in which to make whatever granular analysis the FCC requires for determinations as to whether the necessary and impair standards have been met in particular geographic markets within our states. Without this presumptive impairment (essentially a "hold harmless" period), we fear that customers in a number of may markets will unreasonably and immediately bc cut off from access to competitive choices, while the state commissions complete our fact-based determinations.

This is especially true if the FCC proposes to move forward with a proposal based on broad geographic areas such as deaveraged rate zones, or LATA's. While it may be easy to view, for example, a Zone 1 as a singular monolithic group, that would he incorrect. For example, our largest Zone I exchange area is the Fargo-West Fargo area. It has approximately 90.000 access lines, with over 20,000 more (the City of Moorhead, MN) within its metropolitan statistical area. At the other end of the spectrum, Walipeton, ND has only about 5,200 access lines, yet is still in Zone 1. We fear that an FCC order that paints with too broad a brush when. the geographic market is defined may not take in to consideration the numerous complexities that exist within each of our states. We would note that a LATA-by-LATA market would bc an even broader brush. The potential for harm to customers can be mitigated by allowing a presumptive impairment, hold harmless period.

Thank you for your consideration of this important matter. **As** always, we appreciate the strong working relationship the state commissions have with the FCC. We look forward to assisting you in any manner possible. Please feel free to give us a call if you have any questions about North Dakota's telecommunications market.

Sincerely,

Susan E. Wefald
Commissioner

Tony Clark
President

Leo M. Rcinbold
Commissioner

February 6, 2003

Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Kevin Martin
Ms. Marlene Dorth, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C.

Re: CC Docket Nos. 01-338, 96-98, and 98-147

Chairman Powell; Commissioners Abemathy, Adelstein, Copps, and Martin; and Secretary Dortch:

The Indiana Utility Regulatory Commission is filing this short ***exparte*** letter in the FCC's UNE Triennial Review proceeding to discuss several issues surrounding the possible elimination or phasing out ILECs' UNE-P and unbundled switching obligations: (1) the impact on competition in mass markets (residential and small business), and the appropriate presumption **(or** non-presumption) of impairment; (2) the capacity and capability of CLECs and switch vendors to simultaneously build, program, and install multiple switches in markets all across the country; and ***(3)*** the proper criteria for the FCC to consider IF it elects to establish national impairment standards or a national schedule for eliminating or phasing out ILEC UNE-P or unbundled switching obligations.

(1) The impact on competition in mass markets (residential and small business), and the appropriate presumption (or non-presumption) of impairment of UNE-P.

The IURC believes the following presumptions (or non-presumptions) of impairment would be appropriate.

UNE rate zone 1 (most dense areas):

Scenario # 1: CLEC retail traffic is aggregated at DS1 level or higher - The appropriate finding on impairment would be a presumption that a CLEC would not be impaired without UNE-P

Scenario # 2: CLEC retail traffic is aggregated at level below DS1 (analog loops) - There should be no presumption **of** impairment in this scenario; it would be up to the State Commissions whether impairment exists and whether the ILEC is obligated to provide UNE-P to CLECs.

UNE rate zone 2:

There should be no presumption of impairment. It would be up to the state commissions to determine whether CLECs are impaired without access to UNE-P for all customers, both above and below the DS1 level.

UNE rate zone 3:

The FCC should adopt a presumption that a CLEC would be impaired without access to UNE-P for all customers, even retail customers with traffic above a DS1 level.

Generally, because of the importance of UNE-P to the emergence of local competition, especially over the next few years, it is critical to ensure that ILEC UNE-P obligations are not eliminated on a flash-cut basis. The IURC is particularly concerned about the availability of UNE-P for customers served by analog loops (below the DS1 level) anywhere in a given state (regardless of geography or zone) and ail customers in Zone 2 during the interim period between the effective date of the FCC Triennial Review Order and the date(s) on which the IURC would make any impairment determination(s). Without at least a rebuttable presumption that impairment would exist, CLECs' ability to obtain access to UNEs may be limited under the statutory standards at 47 U.S.C. 251(d)(2)(B) during the transition period. This outcome would be highly detrimental to competitors and their customers who currently receive service from the CLECs via UNE-P obtained from the ILECs and would inject unnecessary chaos into the nation's and Indiana's telecommunications markets.

General concerns

For all UNEs, including UNE-P, regardless of geography or UNE zone, if a State Commission docs not have explicit authority under state law, and if that State determines that impairment does exist, there must be a process in place for that State Commission or CLECs to petition the FCC to challenge a finding of non-impairment or a finding that **a** particular UNE should not be on a national UNE list.

(2) **The capacity and capability of CLECs and switch vendors to simultaneously build, program, and install multiple switches in multiple markets all across the country.** Setting aside the many concerns that state regulators, CLECs, consumer organizations, trade associations, and others have raised about the appropriateness or justification for eliminating or phasing out UNE-P and switching requirements, the IURC believes strongly that any FCC decision that would either eliminate or phase out the ILECs' existing UNE-P and unbundled switching obligations must take into

account the practical aspects of any large switching build-out. Specifically, in developing any national guidelines or requirements, the FCC should consider the amount of time it would take both switch vendors and CLECs to implement a major switch build-out. We have read many trade press accounts and much speculation that the FCC intends to establish some type of grace period – perhaps two years – to allow CLECs time to install their own switches. We strongly urge the FCC – if it has not already done so – **to** ascertain with as much confidence as possible the capacity and capabilities of both CLECs and switch vendors to meet any deadlines or schedules it may propose. The more prescriptive or preemptive the FCC's schedules and deadlines may **be,** the more imperative this becomes. If the FCC does not have reliable data or forecasts on CLEC and switch vendor deployment capabilities. it should consider issuing a Notice of Proposed Rulemaking (NPRM) or other data collection instrument to gather this data. It will be necessary to obtain information from both CLECs (***for each state*** - the number of CLECs the FCC expects to compete against the ILECs, as well as the number of switches the FCC believes each CLEC will install) and switch vendors (in light of the major financial difficulties several major switch vendors have experienced recently (e.g., Lucent and NorTel) and the significant job losses experienced by former employees of those vendors, how quickly could vendors ramp up to simultaneously build out large numbers of switches?

We offer the following example to support our concerns. The current alternative regulation plan for SBC Indiana contains several infrastructure deployment commitments the Company made, including a commitment to upgrade seven analog switches to digital within five years. It appears from a high-level analysis of certain compliance information filed with the IURC that it can take at least a year, and often longer, from the awarding of the contract to the switch vendor to the actual cut-over and transfer of lines from an existing switch to a new switch. Furthermore, SBC was unwilling to commit to a faster time table than the one mentioned above (upgrade seven switches in five years).

(3) What factors should the FCC consider in developing and adopting national impairment standards/criteria or schedules for eliminating *or* phasing out UNE-P and unbundled switching obligations?

The presence of a large number **of** local switches owned by non-ILEC providers may not be a reliable indicator of either competition in retail or wholesale markets, or of the availability of unbundled switching from sources other than the ILECs if the retail market shares held by CLECs – collectively and individually - is low and the retail market share of the ILEC is high. In addition to considering the respective retail market shares of ILECs and CLECs, the FCC should consider the ease of both entry and exit.

Most CLECs are not likely to have a volume of business sufficient to warrant purchase of a dedicated switch. The ***law of diminishing returns*** applies in any analysis of the likelihood of CLECs installing their own switches: even if one or two CLECs that

installed its/their own switch(es) could survive financially chasing after the small customer base not served by the ILEC, that does not mean that an additional CLEC(s) could also survive or could attract enough demand to justify installing its own switch. There must be sufficient personnel and related resources at the independent carriers to operate their switches reliably. Given the serious financial problems and the significant downsizing that almost all CLECs have experienced or are experiencing, this assumption is questionable. It must be possible for CLEC customers to be transferred seamlessly between switches owned by competing carriers - the "hot cut" problem. Absent the ability to execute seamless transfers, requiring self-provisioning of CLEC switches is not a viable competitive option for CLECs to use in serving their existing customers in the market.

Furthermore, absent a statutory requirement for unbundling by CLECs, an expectation that CLECs can obtain switching capacity or unbundled switching from non-ILEC carriers is unrealistic.

Sincerely,

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William D. McCarty, Chairman

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David W. Hadley, Commissioner

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Judith G. Ripley, Commissioner

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David E. Ziegner, Commissioner